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SUPREME COURT, U. S.

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In the

Supreme Court of the United States

No. 71-962

WILLIAM DONALD KELLEY, et al,
Petitioners,

v.

THE TEXAS STATE BOARD OF MEDICAL EXAMINERS,
Respondent.

PETITION OF WILLIAM DONALD KELLEY, ET AL PETITIONERS' MOTION FOR REHEARING

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To the Honorable Supreme Court of the United States:

Come now WILLIAM DONALD KELLEY and the KELLEY RESEARCH FOUNDATION, INC., Petitioners, and make this, their Motion for Rehearing, and would respectfully show unto the Court the following:

POINT ONE

There was no evidence to substantiate a prior restraint of the publication on the grounds that the publication was part of an overall plan or scheme.

POINT TWO

The injunction entered by the Trial Court was unconstitutionally broad and should be set aside as being repugnant to the First and Fourteenth Amendments to the Constitution of the United States. Alternatively, the injunction should be modified so as to conform to the Constitutional requirements.

The entire theme of the Respondent's Brief in this cause is to the effect that the publication in question as part of the Petitioners' overall scheme in practicing medicine, and that the injunction entered below was intended to curtail the entire practice of medicine, not just the publication. The State justifies the suppression of the publication on the grounds that the publication is a part of the Petitioners' overall conduct and is a tool used to further Petitioners' illegal practice of medicine. Accordingly, the State urges that the injunction is not directed merely at the publication, but rather incidentally at the publication as being necessary to regulate the entire field of practicing medicine.

To the contrary, Petitioners' approach in their Petition for Certiorari looked only toward the law applicable to suppressing the publication in and of itself without regard to the part that the publication played in the overall allegations by the State.

THE EVIDENCE

Assuming for the purposes of argument that suppression of the publication would be permitted, if in fact the publica-

tion was being used to further an overall scheme of Petitioners in which actual doctor-patient relationships were being formed, etc., Petitioners contend that the State had the burden to show by clear and convincing evidence the relationship of the publication to Petitioners' other alleged illegal activities. Without such a direct relationship, the enjoining of the publication would have no bearing on the other alleged activities, and would be no justification for the Petitioners' First Amendment rights to give way.

Turning to the evidence, one would expect to find testimony of various persons who read the Petitioners' publication, or at least heard of it, and then ended up in the Petitioners' offices for treatment. To the contrary, the State was unable to demonstrate that the publication had caused even one person to contact Dr. Kelley or to come into his office. In fact, the evidence fails to show that any individual ever saw or talked to Dr. Kelley as a result of the publication. It is difficult to see how the Court below, by any stretch of the imagination, could have found that the publication was being employed as an advertising device or was being used as a tool in an overall picture of an unlawful practice of medicine, when, in fact, a complete void of evidence existed in this area. Accordingly, Petitioners contend that the injunction cannot be sustained constitutionally on the "broad plan attack" set forth by Respondent in their brief, due to a complete lack of evidence in this area. (For obvious reasons, the two State agents contacted Dr. Kelley for reasons wholly outside of their having read the publication.)

SCOPE OF THE INJUNCTION

Assuming now, for purposes of argument, that the evidence was sufficient to warrant the injunction in accordance with the Respondent's "broad plan attack" that the publication was an integral part of an overall scheme, Petitioners contend that the terms of the injunction are unconstitutionally broad. This contention is premised on the fact that under the terms of the injunction, even if Petitioners do not practice medicine in any form or respect, and even if the publication is not used as part of an overall plan or scheme in the future, but is simply used as a publication to disseminate Dr. Kelley's ideas and nothing else, the injunction prohibits such use and distribution.

The Respondent's argument retains its credence only so long as the publication continues to be part of an overall plan. When the injunction below effectively eliminated all other parts of the plan, this then left open the question as to whether or not the publication, standing alone, could also be enjoined.

At this point, all of the arguments and authorities set forth in Petitioners' Application for Certiorari come in to focus, and the approach of looking at the publication separate and apart from the other activities alleged becomes applicable. It is also at this point that the injunction demands that the publication be suppressed even if the Petitioners will not or do not participate in the other various acts alleged, and even if the publication will not be used as an advertising mechanism or as part of an overall plan to aid

and abet the practice of medicine. The State has done far more than simply to enjoin the publication as part of an overall picture. Rather, the State has used the alleged overall picture as an excuse to justify the accomplishment of their main objective, that being the suppression of the publication itself without regard as to whether the other alleged facts and circumstances have in actuality existed in the past or will continue to exist in the future.

Petitioners urge this Court to view the injunction as having effectively disposed of the other alleged activities of Petitioners, and having so disposed of same, to have gone one step further by violating the Petitioners' First Amendment rights with the suppressing of the publication in question. It would have been a very simple matter for the Trial Court to have enjoined Petitioners from using the publication as an advertising scheme, as a device to aid or abet the unlawful practice of medicine, etc., which would have amply provided the State with the protections that the State claims it seeks; but to go further than this and to prohibit, in its entirety, the right of the Petitioners to disseminate their ideas, is a direct violation of Petitioners' First Amendment rights in accordance with the authorities cited in the Petitioners' original application.

Alternatively, should the injunction not be dissolved for the reasons aforesaid, then Petitioners respectfully request this Honorable Court to modify the terms of the injunction so as to afford the State the protection that they are allegedly seeking, by prohibiting the Petitioners' use of the publication

as advertising material or as part of an overall plan etc., while at the same time modifying the injunction so as to permit the Petitioners to exercise their rights of freedom of speech and press in freely disseminating their ideas.

PRAYER

WHEREFORE, premises considered, Petitioners pray that this Motion for Rehearing be in all things granted, that the injunction heretofore issued be dissolved, or alternatively, that the injunction heretofore issued be modified by this Court so as to be in conformity with Petitioners' rights of freedom of speech and press as well as with the rights of the State of Texas and the Texas State Board of Medical Examiners.

Respectfully submitted,

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By _____
Harry W. Margolis
Attorneys for Petitioners.

CERTIFICATE OF SERVICE

I, HARRY W. MARGOLIS, Attorney of Record for Petitioners in the above cause, do hereby certify that I have, on this 1st day of June, 1972, sent by first class United States mail, postage prepaid, three copies of this Motion for Rehearing to the following attorney, being the attorney for Respondent, at the address indicated:

Mr. Guy C. Fisher
Assistant Attorney General
Capitol Building
Austin, Texas.

Harry W. Margolis

RULE 58 CERTIFICATE

I, Harry W. Margolis, Attorney of Record for the Petitioners in the above cause, do hereby certify that the foregoing Petition for Rehearing has been presented in good faith and not for delay, and that said petition has been confined to argument which the Petitioners have not previously presented to this Court, all in accordance with Rule 58.

Harry W. Margolis